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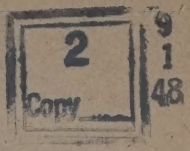

STARE DECISIS

The Fundamentals and the Significance
of
Anglo-Saxon Case Law

by

Rudolf Laun

Second, enlarged edition.

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PREFACE

The first part of the work in hand is a reprint of the author's article on *Stare Decisis,* 25 Virginia Law Review, 12 (1938). The editor of this review, Mr. Allen F. Maulsby, has consented to this reprinting. The text of his letter is given on the next page. The author avails himself of this opportunity in order to express his thanks to the editor and the publishers.

This article published in 1938 was the result of researches which the author had made in 1934/35, when he was a Visiting Professor of Political Science, College of Literature, Science, and the Arts, and Visiting Research Professor in the Law School, University of Michigan, Ann Arbor Michigan. The second and third parts of the work in hand were written in Hamburg, in May and June 1946, in order to continue the former work as far as the conditions existing in the libraries in Hamburg at present and some materials which the author brought from America enable him to do so.

In spring 1915, when the "Organization for a Durable Peace" *("Organisation Centrale pour une Paix durable")* was founded in The Hague, the author had the honour of being invited to collaborate in the Peace Work of that international society and joined it as a member. From that time on he has advocated a truly democratic solution of the various international problems, and in this respect he refers to the various publications of that society, to the work of C. A. Macartney, National States and National Minorities, Oxford University Press, 1934, p. 214, n. 1, and to Strupp, Wörterbuch des Völkerrechts und der Diplomatie, Berlin und Leipzig, II, 1925, pp. 87 ss. and 107. He continued the same course when, in 1919, he was a member of the Austrian Peace Delegation in St. Germain - en - Laye, 1919. In his scientific works, he always tried to pay particular attention to the problem of conscientious scientific objectivity, and he has stated his reasons and expounded his theory

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in his works: Der Staatsrechtslehrer und die Politik, 43, Archiv des öffentlichen Rechts, 145, 1922, Le Démocratie, Paris, Institut International de Droit Public, 1933, Introduction and 3d chapter, and Studienbehelf zur Vorlesung über Allgemeine Staatslehre, Im Selbstverlag der Universität Hamburg, 1945, 4th ed. 1947, Otto Meißners Verlag, Hamburg, §§ 5 and 30. In order to to find a basis of incontestable general validity for his researches he dealt with theory of knowledge in his works: Der Satz vom Grunde, Tübingen, J. C. B. Mohr, 1942, and: Die Grundlagen der Erkenntnis, Tübingen, J .C. B. Mohr, 1946.

With respect to theses attempts to raise scientific work to the highest level attainable and to make international objective science serve the moral ideal of a just and durable peace, the author may be permitted to express the hope that international objective science, above any political struggles, imputations, and reprisals, will lead civilized mankind to a better future. It is the task of this work to throw in the author's mite in order to contribute to this aim. In the world there are many Religions, many States, many Races, many Languages, but one unique International Objective Science.

Hamburg, in September 1947.

Rudolf Laun.

Virginia Law Review
University of Virginia
Clark Memorial Hall
Charlottesville, Va.

3 April 46

Prof. Dr. Rudolf Laun
Woldsenweg 11
Hamburg 20, Germany

Dear Professor Laun:

This will acknowledge with thanks receipt of your cordial letter of 6 February directed to The Michie Company. May I advise you that you can feel perfectly free to reprint in Germany your excellent article on *Stare Decisis* which appeared in (1938) 25 Va. L. Rev. 12.

I am attempting to reach you through several different channels, and I earnestly hope that at least one of the letters will get through. You must, of course, put any thoughts of returning expenses out of your mind. It is a pleasure to be of service to you.

I am grateful for your kindness and consideration in our regard relative to the reprinting of your paper. Possibly sometime in the future we shall again have the honor of carrying your name in our pages.

Respectfully,
Allen F. Maulsby
Editor

I.

This essay deals with the question: what is it in prior decisions that is to be followed in Anglo-Saxon Case Law?

It is a problem of far-reaching importance. An analogous question could be extended to all systems of law and examined up to the ultimate fundamentals of the philosophy of law, but would require a voluminous treatise. The scope of this article is restricted to Anglo-Saxon Case Law and to considerations which, though partly derived from theoretical arguments, might perhaps be useful in the ordinary work of judges, attorneys, and legal authors.

The doctrine of adherence to judicial precedents is expressed in the maxim *"stare decisis"*. This means, as is well known, that once a question of law has been officially decided, by the ruling of a competent court in a case in which it was necessarily involved, the rule so established will be applied, on the principle of *stare decisis*, to any similar state of facts subsequently arising to which it is applicable, without any re-examination of its correctness in point of law.

According to this conception, the judicial precedent rules the subsequent decisions, provided that the facts are similar and the rule is thus applicable to them. Consequently the link that connects a later decision with the precedents, on the principle of *stare decisis*, is logic: for only logic is competent to decide on this principle whether facts are "similar" to other facts and consequently whether a rule established in the first case is "applicable" to the second case.

The laws of human logic are immutable. Given facts, as well as the whole past, are also unalterable. The prior decision is a given fact of the past. If these tenets are accurate, the immutable laws of human logics must lead from the unalterable first decision to an absolutely predestined second decision. Thus, if we consider the immutability of the precedent regardless of its correctness in point of law, *stare decisis* means *non quieta movere*.

But decisions are not absolutely predestined. We are faced by the very well known "diversity of judicially asserted doctrines on the same point which so frequently exist in our case law and the widely different opinions of our best judges with respect to them".[1] Cardozo complains: "* * * unwritten is my table of logarithms, the index of the power to which a precedent must be raised to produce the formula of justice".[2] Oliphant has shown that "innovation has been at work and is carrying us farther and farther toward treating this ancient doctrine as if it were *stare dictis* instead of *stare decisis*".[3] And what can be expected from following

[1] Pound, An Introduction to the Philosophy of Law (1922) 108.
[2] Cardozo, The Paradoxes of Legal Science (1928) 2.
[3] Oliphant, A Return to Stare Decisis (1928) 14 A. B. A. J. 71, 72.

dicta? Cardozo says: "I own that it is a good deal of mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition." [4] Innumerable citations could easily be added to the foregoing.

An enormous literature has been developed which tries to explain why decisions are not absolutely predestined by given law plus logic, *i. e.*, either by given precedents plus logic or by given articles of statute law plus logic. Gény's theory of interpretation, the German Freirechtsschule ("School of free law") or Stammler's just law may be recalled as examples. Much has been written in this connection with regard to Anglo-Saxon judge-made law. Cardozo, for instance, distinguishes four "directive forces of a principle", namely: "logical progression", "historical development", "the customs of the community", and "justice, morals and social welfare, the *mores* of the day".[5] Whatever may be thought of these and other theories, they all agree in one point that, in addition to precedents and logic, there must be other elements or at least a third element influencing subsequent decisions or creative precedents.

In qualification of all such theories it may be said that logical progression cannot be on a parity with the other elements. Historical development, customs, social welfare, etc., may perhaps be considered as *sources* of a decision, in the same way as a precedent is a source of a subsequent decision. But logic as such can never be a source in itself, it is only a means of thinking which leads us from a given source to a new decision. Without a premise, from which to progress, logical progression is impossible. On the other hand, logic is indispensable in *all* cases, no matter from what source the decision is derived. Furthermore, historical development, customs, justice, social welfare, etc., if looked upon as being sources of a judical decision, can be linked to this decision only by logic.

Consequently, when criticising a decision we must always distinguish criticism of the source or premise from criticism of the logical construction. Source and logic are often confounded. In the famous *Pinnel's* case [6] "it was resolved by the whole court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum. * * * But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff. * * *" The words "cannot be",

[4] Cardozo, The Nature of the Judicial Process (1921) 29, 30.
[5] Cardozo, The Nature of the Judicial Process (1921) 30, 31.
[6] 5 Co. 117 a (C. P. 1602).

"can be" seem to indicate that in this dictum a question of pure logic only was resolved. The matters "resolved" by the court have had great influence upon many later decisions, as is well known. But the courts, while following the dictum "have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty".[7] Many decisions cited and quoted by Parsons, C. J. in *Frye v. Hubbel,*[8] criticise the rule as if it were a rule of pure logic, as for instance: "The rule * * * was a deduction of strict scholastic logic * * *."[9] "The absurdity and unreasonableness of the rule seem to be generally conceded * * *."[10] "Scholastic or any other variety of logic which establishes the sign to be more valuable than the thing signified, the shadow superior to the substance, the possession of an order for money more beneficial than the cash that can be obtained upon it, is the logic of unreason."[11]

Have the laws of logic changed from 1602 to our times?

If they have not changed, if our laws of logic are the same as they were in 1602 and if consequently there must have been an obvious logical mistake in the dictum of 1602, why have the courts followed it in spite of their criticising its "reasonableness, justice, fairness, or honesty"? What is it in prior decisions that is followed and what is it that should be followed?

The theories hitherto advanced, such as for instance those of Gény, the Freirechtsschule, Stammler, and Cardozo, and many others, give us ambiguous answers. It may be that a decision should be derived from the feeling of justice, or from just law, or from customs, or from social welfare, etc. But *when* should this be the case? When is social welfare stronger than a precedent and when is a precedent stronger than social welfare? When should the *ratio decidendi* of a prior decision be preferred to contrary customs or moral convictions and when should it give way? What is the true decisive rule of a creative precedent or a decision that calls itself a "maverick"?[12] Such questions could easily be multiplied. Besides, when interpreting dicta in order to determine a precedent we must, as every law student knows, separate the essential from the non-essential and accidental. But what is more essential, following the maxim *stare decisis* and, perhaps, *stare dictis,* as Oliphant expressed it in the article quoted,[13] or deciding in conformity with recent customs or recent opinions on public welfare? Thus, if the second

[7] Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351 (1891); Frye v. Hubbell, 74 N. H. 358, 68 Atl. 325 (1907).

[8] 74 N. H. 358, 68 Atl. 325 (1907).

[9] Ebert v. Johns, 206 Pa. 395, 398, 55 Atl. 1064 (1903).

[10] Clayton v. Clark, 74 Miss. 499, 509, 21 So. 565, 569 (1897).

[11] Curlewis v. Clark, 3 Ex. 375, 380 (1849).

[12] Commercial Standard Ins. Co. v. Fidelity Union Ins. Co., 111 S. W. (2d) 1167 (Tex. Ct. Civ. App. 1937).

[13] See *supra* note 3.

decision is to be interpreted in a third case, where is the exact line of demarcation between the essential and the non-essential, between *ratio decidendi* and mere dicta within the text of the second decision?

It would be easy to assert that in any case what is sought is nothing but just law. But what is just and what is unjust law, for instance, in cases involving social conflicts or dissenting legal opinions? Neither Stammler's nor any of the other well known theories hitherto developed are able to show us an exact line of demarcation between the just and unjust in a concrete case of doubt. On the contrary, they must necessarily restrict themselves to general principles which, consequently, when applied to concrete cases are for the most part indeterminate. It would be impossible, as an example, to decide a single concrete case of doubt under the guidance of Stammler's work: "Die Lehre von dem Richtigen Rechte."

Thus, the question: *what is it* in prior decisions that is to be followed? has remained unsolved up to this date. This "what" is an unknown "x".

It cannot be the task of this short article to deal with the whole problem of the essential and non-essential or the just and unjust in judicial decisions. But it can and will endeavour to indicate the way leading to clearer and more exact decisions by examining the true nucleus of the unknown "x".

This problem, if carried to its ultimate philosophical fundamentals, would likewise require a voluminous treatise. The following arguments will attempt to outline the essential ideas in a few pages and to develop some practical considerations from them. The path begins with abstract theory, but ends, it is hoped, in useful and practical purposes.

In this connection, two peculiarities of Anglo-Saxon Case Law must be left out of the question: firstly the duty of a lower court to follow a precedent established by a higher court, and secondly the doctrine that the House of Lords is absolutely bound by its own prior decisions.

As far as a judge is bound to follow a precedent furnished by a higher court, he is subordinate to this court in a similar manner as administrative authorities are subordinate to their superiors. As is well known, administrative authorities are in general bound to follow not only the express commands but also the views and intentions of their superiors as far as they know them. If a court has to decide a question of law in a concrete case, the tenor of a sentence pronounced by a higher court concerning the *same* case is comparable to an express command of a superior to a subordinate administrative authority. On the other hand, the *ratio decidendi* of such decision, as far as it *exceeds* the concrete case and involves an abstract rule, as well as a mere dictum of such deci-

sion, is comparable to the views of superior administrative authorities *not* expressed in the tenor of a command.

Thus, if the Anglo-Saxon judge is bound to follow not only the decision of a higher court pronounced in the *same* case but also *rationes decidendi* proclaimed by a higher court in *other* cases, his sphere of action, as compared with the power of the judges in continental Democracies or Constitutional Monarchies, is limited by a particular duty of obedience, a duty to follow the views and intentions of his superiors.

It is not the task of this article to deal with the superiority and subordination among courts. *It will restrict itself to examining the authority of a decision in the court which made it, or in a court of coördinate jurisdiction.*

The second point that must be left out of the question, if Anglo-Saxon Law is looked upon as being a whole, is the view which seems to prevail in England that the House of Lords cannot depart from its own precedents in judicial matters. As is well known, this theory is not an ancient one, and it can be explainend by political reasons only. Thus, it might happen that the House of Lords overrules its own previous decisions at any time. But as long and as far as the doctrine prevails, we are faced by a selfrestriction the logical premise of which is infallibility.

In Canon Law, the Ecumenic Council is infallible as well as the Pope "dum ex cathedra loquitur". It follows that, if once a dogma is proclaimed, be it a "dogma fidei" or a "dogma morum", particularly a command of Divine Law ("jus divinum"), it can never be abrogated. Thus, the Ecumenic Council and the Pope are absolutely bound by their own prior decisions, as far as dogmata are concerned. The House of Lords is in a similar position with respect to laws of this lower world.

The following research will not examine this particular case of human infallibility.

Thus, the article in hand restricts itself to those cases in which courts abide by former precedents, where the same points come again in litigation, *without* being bound either by subordination to a higher court or by the mentioned doctrine concerning the House of Lords.

After having excluded these two points, we return to our question: what is it in prior decisions that is to be followed?

Juridical practice as well as *communis opinio* in jurisprudence is based upon "juridical positivism", which means that the State is looked upon as the creator of Law, and Law as a system of rules to be obeyed or a system of values, an "ought" or "ought to be", the justification of which is derived solely from the actual power of the State to realize and enforce it. When the State is spoken of in this connection, International and Church Law are eliminated from consideration. The State is the creator of Law either in the form

of written legislation, statute law, or in the form of customary law derived from the power of the authorities and courts. The binding force of a precedent is, according to juridical positivism, a consequence of the authority of State Power.

"Positive Law", according to the interpretation generally accepted, is therefore an "ought", a legal "obligation" (analogous to a moral "obligation"), which is derived from the actual power exercised by the State. This actual power of the State consists of the actual or probable obedience of its public servants, *i. e.*, the army, police, and civil officials and employees, and of the fact that these servants dispose of means of enforcement. The obedience is a fact, and the possession of the means is a fact. Consequently, the "ought", the "obligation", is derived from mere facts. Positive Law as generally conceived consequently confounds reality and value, facts and obligation, "what is" and "what ought to be". Not only is this true, but logic is usually confounded with its premises, no matter whether these premises are facts or judgments of value, as illustrated in the decisions criticising the dicta in *Pinnel's* case.

It may be said, in broad terms, that juridical positivism puts its trust in a juristic logic, which is, in reality, a conglomerate composed of facts—namely the presupposed means of psychological and physical coercion by State Power—of judgments of value or an "ought", and of logical progression from either those facts or these judgments of value.

In opposition to juridical positivism the author has endeavoured to develop a theory of law based upon an exact distinction between facts and judgments of value, between what is and what ought to be, in his rectorial address entitled "Recht und Sittlichkeit." [14]

According to this theory, the positivistic conception of law is mistaken. The true creator of law cannot be the State, or any organ of the State, whether Parliaments, Monarch, Court, or any other agency. The true, *i. e.*, the ultimate source of all legal as well as moral obligations can be found only within the individuals themselves who are required to obey a certain legal or moral rule.

It is essential that facts and judgments of value, force and duty, might and right, must and ought to be clearly distiguished from each other. If Law were to be deduced from force and coercion, a successful band of robbers would be invested with the same

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[14] Delivered at Hamburg in 1924. (3d enlargad ed. 1935.) For further discussion of this theory, see the author's book *La Democratie*, written at the invitation of the Institut International de Droit Public and published in Paris in 1933, particularly pp. 82-91; The Journal of Philosophy (1935) No. 19; Book Rev. (1936) 84 U. OF PA. L. REV. 800; Philosophical Review, March 1937; The International Journal of Ethics, July 1937.

Reference may also be made to the author's book *Der Wandel der Ideen Staat und Volk*, published by the Institució Patxot in Barcelona in 1933, pp. 327 *et seq.*, particularly with regard to International Law and the relations between International Law and Municipal Law.

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authority with regard to their victims as the State with regard to its citizens, and the thief, whose crime could not be brought home to him, would have the same legal standing as the honest man who had not availed himself of a safe and sure opportunity of stealing something. The soldier who, in times of war and in fulfilment of his duty as a defender of his country, killed his enemy, would be no better than a common murderer. The difference between right and wrong in these cases does not lie in facts and causalities but in judgments of value.

It therefore seems to the author that it is necessary to oppose all previous theories of law by developing a new one, the basis of which must be the following statement: "No value can be derived from reality. 'What should be' cannot be derived from 'what is' ". While our logic can derive duties from other duties or judgments of value it can never derive them from facts, just as it can never derive facts or causalities from judgments of value. Consequently it does not follow from the mere fact that some authority issues certain commands, no matter whether it be a Parliament, a Monarch, a Court, or another State organ that it should be the "duty" of others to obey. They can be *forced,* by external means of coercion, but they cannot be bound by duty unless they create the feeling of obligation within their own heart. Coercion results only in conformity in outer demeanour and even that is not possible in every case. But the conscientious approval of even the most humble and insignificant member of the community based on his feeling or sense of justice cannot be exacted by any power in the world.

Consequently, the final ground of legal as well as moral obligations, the ultimate source of law and morality is the autonomous subjective experience of the individual: "I ought". The thesis advanced may therefore be called the theory of the *autonomy of law.*

This theory is diametrically opposed to anarchism. Juridical positivism cannot preserve society from anarchistic consequences in the long run, because its ultimate bases are mere physical power and violence. It cannot explain why we differentiate between a State, and a huge band of robbers. The consequences can be seen not only in International Law, but also in the internal Law of some contemporary States, where only the use of utmost force is able to prevent anarchy. According to the theory of the autonomy of law, on the contrary, there exists a supreme premise on which to base deduction both moral and legal, which is placed *above* the State and its positive legislators. True Law and morals, being one and the same, belong to the world of values, whilst so-called "positive" law, namely coercion by State Power, belongs to the world of facts and causalities. Thus, in contrast to a huge band of robbers, the State derives its authority from superior values both moral and legal. The world of values, it is true, exists only in the conscience

and the sense of justice of individuals, but it is a given fact as far as the given convictions of a given population or its majority are concerned. By its commands, the State not only threatens the application of coercion and punishment like a band of robbers, but at the same time appeals to the conscience and sense of justice of its citizens in an endeavour to have them look upon their obedience as *legal* and obey because it is their *duty* to obey and not merely because they are afraid not to obey like the victims of the band of robbers.

Thus, the true supreme legislator is the autonomous conviction of the individuals or the majority of individuals. The commands issued by the State, no matter whether it be the Legislative Power of positive State Law, or Courts in judge-made Law, are therefore, figuratively speaking, *claims or offers, by means of which the legislator, in addition to his threats of force, appeals to the citizens for their moral and legal approbation.*

The foregoing is the substance of the theory of the author so far as it need be considered for the purposes of the present article. At first sight, various objections might be raised, with particular reference to constitutional, administrative, and International Law. But Anglo-Saxon Case Law, based upon such time-honoured traditions, deemed by leading jurists of the whole civilized world to be one of the most eminent creations in the legal history of the world and constituting the juridical fundamentals of the two most powerful States in the world, seems to the author to offer the best proof that true law, law looked upon as being an "ought", a duty, and not mere force, is created not by those who command but by those who are required to obey. Otherwise, is it really conceivable that the accidental personal sense of justice—or supposed juristic logic, as in *Pinnel's* case—of a few judges, who by chance have to decide a question as yet unsolved, should create duties for generations, for hundreds of Courts and millions of individuals?

It may thus be asserted that creative precedents derive their authority not from the persons deciding the case or from a mysterious power of these persons to obligate other persons in subsequent cases not yet known and not involved in the concrete litigation but, on the contrary, from judgments of value placed *above* the Court and *above* all State Power; these judgments of value can be found only in the given sense of justice of the people, *i. e.*, in the autonomous subjective experience of the majority of those who, if the abstract rule of the *ratio decidendi* is applied to other concrete facts, are required to obey.

The question: what is it in prior decisions that is to be followed has now been answered in principle. *Stare decisis* does not mean either following *rationes decidendi* as such or general principles as such. On the contrary, it means following prior decisions only because and as far as the *rationes decidendi* of these decisions would

hypothetically be consented to today by the conscience and the feeling of justice of the majority of all whose obedience is required by the rule of law on which the *ratio decidendi* of the prior decision was logically based. The path that leads to the right solution in a concrete case of doubt may be almost as difficult as before, but we at least know its direction. Cardozo's table of logarithms is not written, but the method by which it can be constructed is indicated. The nature of the clue to be looked for in cases of conflicts, such as conflicts between a precedent and social welfare, or two precedents, or two opinions on social welfare, is evident.

This reasoning clarifies the difference between the dicta of *Pinnel's* case and the later decisions mentioned. *It is not human logics which have changed but judgments of value.* In 1602, the sense of justice of most individuals adhered to a formalistic rigorism not known in our days. It would not be difficult to find many similar examples.

The more a *ratio decidendi* is adhered to in subsequent decisions, the more likely is it that it corresponds to the feeling of justice of the population or that part of the population whose obedience is required by the rule involved in this *ratio decidendi.* The converse is equally true.

It follows from the preceding considerations that the *intrinsic value* of a rule of law or a presumptive rule of law, i. e., its *capability of influencing later decisions* in general and on principle depends upon the proportion existing between those who are required to obey the rule and those who consent to it. It is possible to express this relation by a quite simple formula.

Let the *number of all who are required to obey a certain given or presumed rule of law* be called "m". In many rules of common law as for instance most rules concerning contracts or personal property as far as every day life is concerned, "m" is the whole nation or, if we deduct children and adolescents, the number of adults in the nation. Considering Anglo-Saxon Law as a whole, in some questions "m" comprises both the American People and the Anglo-Saxon population of the British Empire. It would even be possible to go still farther. If the arguments touched upon above are correct, there must be questions of law concerning every day life which are common to several or perhaps to all civilized nations and which consequently lead to the problem of a *World Law* based upon the conscience and feeling of justice of civilized Mankind. But it is not the purpose of this article to deal with this problem and the hope can only be expressed that it may be possible to examine it in later publications. Conversely "m" may be restricted to the population of one State or some States, or of a certain community, or to a certain part of the population, *e. g.,* the employers and the employees, or the brokers, or the miners.

"m" is the number of all those who can be forced and, in the case of disobedience, probably will be forced by State Power regardless of their conscience and feeling of justice.

Next, let the *number of all who consent to a certain given or presupposed rule of law in their conscience and feeling of justice* be called "c". This number comprises firstly all those who obey voluntarily regardless of any coercion or threat of coercion, and secondly those who, though not obeying, have a feeling or conviction of wrongdoing when they act contrary to the rule. "c" does *not* comprise those who obey the rule only through fear of coercion while convinced or at least feeling that the presumed rule is "wrong" and that disobedience would involve no moral blame, as well as those who disobey actuated by a conviction or feeling that they are right and the presumed rule is wrong.

To summarize, "m" can be defined as the number of those who are *required to obey* a rule and "c" as the number of those who *consent to* this rule.

Consequently, the intrinsic value of a given or presumed rule of law can be expressed by a formula indicating the relation existing between "m" and "c".

If the number resulting from the division of "c" by "m" is called the Consent quotient and "q_c" is used as the algebraic symbol of this quotient, the formula will read:

$$q_c = \frac{c}{m}.$$

The quotient is called the consent quotient, because it indicates how many of those who can be forced and, in the case of disobedience probably will be forced by State Power to obey a certain rule regardless of their feeling of right and wrong, *consent to* this rule.

Leaving statute law and unexpected events like wars or revolutions out of consideration, it may be said that, in the long run and in spite of all errors of positivistic interpretations of *rationes decidendi* and *dicta*, the stability of a rule or the equivalent thereof, its capability of influencing later decisions, depends in general upon the extent of such consent and therefore can be figuratively expressed by the consent quotient. *The likelihood that a ratio decidendi or a general principle expressed in a dictum will be followed in later decisions varies directly with the size of the consent quotient.*

In the case of an ideal law, "c" would be equal to "m", which would mean that all required to obey this ideal rule, consented to it. In this case, the equation would read:

$$q_c = \frac{m}{m} = 1, \text{ or } q_c = 100\,\%$$

In most questions of law, however, no such unanimity exists, and the quotient is below 1. or 100 %, respectively. Nevertheless, the

nearer "q_c" is to 1 or 100 %, the more stable is in general the rule. Conversely, the farther "q_c" is from the optimum value the less settled is the rule. Thus, *the consent quotient is in general an algebraic expression of the probability that a certain given or presumed rule of law will be followed in future decisions.*

Particularly in creative precedents *the consent quotient is the only correlation of facts attainable pointing to the future.*

It is true that it will hardly be possible to prove or even to assert in any case with any degree of probability that "m" and "c" are equal to definite quantities, for instance that 400,000 individuals are required to obey a certain rule and that 300,000 of them approve it in their sense of justice, while 100,000 either obey it only through fear of coercion or do not obey at all. Nevertheless, in some cases, a specific numerical value for the proportion m : c, *e. g.*, 4 : 3, might perhaps be given with comparative accuracy. It is even thinkable that, at a later stage of development, tests might be made with regard to say 100 or 1000 individuals chosen at random, either for legislative purposes or in particular and important concrete cases. But even if we disregard the possibilities of a later evolution of this nature, the opinion might be expressed that in some cases the arguments of counsel and the bench could gain in exactness and success if it were realized that the true source of law is neither the precedent as such nor juristic logic as such nor general principles as such but the sense of justice of those who are required to obey.

In consideration of the arbitrariness of many legislators who believe themselves to be legally omnipotent, it may with reason be claimed that judge-made law can be a much more adequate and stable form of law than statutes. But statute law is at present ever gaining ground at the expense of case law. The first step in the defense of judge-made law and thus the position of judges, attorneys, and legal authors against the crushing weight of sometimes arbitrary and always seemingly omnipotent statutes is interest in and close study of the philosophy of law, particularly in the Law Schools. Unfortunately juridical positivsm, both Anglo-Saxon and continental, is in general not very much interested in the philosophy of law, and thus means a deplorable set-back as compared with the period of rational natural law. Legal science should take the lead as was the case with natural law literature, instead of for the most part lagging behind cases and statutes. Even the absolute Monarchs of the eighteenth century were restricted by natural law, generally believed in at that time. Today, the State legislator sees no limits at all restricting his supposed legal omnipotence.

"Jurisprudence", says Cardozo,[15] "will be the gainer in the long run by fanning the fires of mental insurrection instead of smother-

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[15] Cardozo, The Paradoxes of Legal Science (1928) 3.

ing them with platitudes", and he cites a passage of Whitehead,[16] wich which this article may fittingly be concluded:

"If Science is not to degenerate into a medley of *ad hoc* hypotheses, it must become philosophical and must enter upon a thorough criticism of its own foundations." We may say the like of law.

II.

The preceding lines, reprinted word for word from the author's article on "Stare Decisis" in 25 Virginia Law Review 12, 1938, have tried to answer the question: "What is it in prior decisions that is to be followed in Anglo-Saxon Case Law?"[17] The answer was: the true source of law, which is to be followed, is the conscientious approval, the *sense of justice*, of those who are required to obey, or at least of the majority of them.

This result, however, leads to a new question: does this answer render the meaning of existing "positive" Anglo-Saxon Law or is it merely the expression of subjective ethical feelings and wishes of the author? In other words: has the author founded his theory on principles valid *de lege lata* or on arguments *de lege ferenda*? Does the question: "What is to be followed" mean: "what *must* be followed according to positive Law," or does it mean: "What *should* be followed in an ideal system of law?"

Analogous questions could be extended to *any* legal theory that tries to show a new way to legal practice. If examined in a consequent manner, such questions lead to one of the most sublime problems of ethics, philosophy of law, and philosophy of history, namely the conflict between *Must* and *Ought*. Systematically dealing with this problem would require a voluminous work. Thus, the article in hand must restrict itself to the most essential points.

We must not confound juridical positivism with researches on the problem of the positivity of law. The following lines will try to develop a non - positivistic theory of the positivity of law.

Juridical positivism suffers from a *circulus vitiosus:* The allegiance to the commands of the legislator or, in other words, the binding force of law, is deduced from the *physical power* of the State to enforce these commands in case of disobedience; on the other hand, this physical power must be a power of the *State*, which means, it must be used by public functionaries invested with a certain *legal* power granted by the legislator. Thus, legal power is derived from physical power and physical power from legal power.

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[16] Whitehead, Science and the Modern World (1925) 24.

[17] pp. 12, 16, 18, 21/22 of the original text, published 25 Virginia Law Review: above, pp. 6, 9, 10, 13.

Consequently, the supreme legislator, namely those persons who are vested with sovereign authority of the State and with the power to give and abrogate the Constitution, as for instance an absolute Monarch or dictator, the members of a Parliament, or the voters of a whole Nation in a democratic plebiscite, possess, according to juridical positivism, not only the ability to confer upon other public functionaries their respective competence, jurisdiction, or authority, but are able by legally organising the physical power of the State to bestow supreme legislative power on themselves, similar to the famous Baron von Münchhausen, who was able to drag himself out of the mire by his own pigtail.

In reality, as we have seen in the first part of the work in hand, the supreme legislator derives his authority from the conscientious approval of those whose obedience he requires. This result, however, imposes upon us the necessity of facing a new difficulty.

In history as well as in present times there existed and exist non-democratic States, where most probably the majority of those who were or are required to obey did and do not consent to many of the existing laws and to many decisions of courts and administrative authorities; nevertheless, such States have undoubtedly a supreme "legislator" and a "positive" law, acknowledged by international law, international jurisprudence, and international public opinion. But even in Democracies it is not always certain, whether the will of the supreme legislator and the execution of this will by the public functionaries are really approved by the conscientious feelings and the sense of justice of the majority of the population, as for instance, if a long time has elapsed from the day of the last elections, or with respect to secret diplomatic negociations or to military measures in times of war. Yet, according to international law, international jurisprudence, and international public opinion, in such cases, too, State power has to answer for the acts and doings of Parliament, diplomatic agents, and military commanders.

We may say the like of judge-made law. No matter whether the *rationes decidendi* of a decision coincide with the moral convictions and the sense of justice of those who are required to obey, the decision demands obedience, not only on the principle of *res judicata* in the particular case judicially acted upon, but also on the principle of *stare decisis* in any similar case subsequently arising, without any re-examination of its correctness in point of law.

The preceding considerations refer to given and undeniable facts. The question arises: do not the mentioned facts as such, as for instance the command of an absolute Monarch, a resolution passed by a Parliament, a judgment, a creative precedent, create true obligations, true legal duties? In other words: is it true that facts as such create a Must only? Do they not create an Ought?

In the opinion of the author, the answer is: they do, but, in this connection, the words: obligations, duty, Ought, are of double

meaning. Consequently the expressions: law, legal, and some derivatives of them are of double meaning as well. Generally speaking, these remarks refer to any expression bearing the meaning of something that *should* be done in opposition to what *is* already or *has been* done.

Corresponding to this ambiguity, also the words: "is", "to be", "to exist", "fact", "must" and others are of double meaning.

In a *wider* sense, judgments of value or logical judgments upon what ought to be "exist" and are "facts" as well as the given reality of material things or physical events. In this sense, *everything* in the Universe "exists", including moral and legal "duties". If we consider this meaning only, we may call legal duties "facts".

But there exists a *strict* sense of the words "duty", "obligation", "ought to", "to be to". In this sense, "facts" and "judgments of value" or "reality" and "judgments of value" are contradictory and we must clearly distinguish between duties, obligations, judgments of value or judgments upon what ought to be on one side and facts and causalities as well as judgments upon what exists on the other. In this sense, it would be meaningless to say that something "ought to be" or "should be", if it "is" or "exists" already; on the other hand, something can be the subject of an Ought, of a duty only, if that what is to be done has not yet been done, if the duty has not yet been fulfilled, if the contents of the duty are not yet a "fact". It is this second, strict sense only, to which the author's thesis: "No value can be derived from reality" or: "No value can be derived from facts" is applicable.

Juridical positivism constantly confounds the two meanings by deducing legal power from physical power. The deduction would read as follows:

1. *Major:* It is a "fact" that the State has the strongest physical power within its territory.
2. *Minor:* It is a "fact" that the State has the strongest legal power within its territory.

Conclusion: the two "facts" are identical, or: the strongest physical power is the strongest legal power.

The result is equivalent to the sentences: might is right or: he who is the strongest is right. *Juridical positivism is the theory of the so-called "right of the stronger".*

It is easy to see that even if the words "fact" in the major and the minor had the same meaning, nevertheless the conclusion would not be correct. It would presuppose that we knew already from another source of knowledge that *every* State has the strongest legal power as well as the strongest physical power within its territory. But experience teaches the contrary. In International Law, juridical positivism as well as any other theory hitherto known classifies the States of the International Community into Sovereign and Part-Sovereign States. In the science of public law in general,

the authorities are divided on the question whether sovereignty is an essential characteristic of the State. If the whole territory of a State is occupied by military forces of the enemy according to Art. 42 of the Hague Regulations respecting the Law and Customs of War on Land or according to the corresponding customary law ("coutumes de la guerre") defined by the Regulation (Introduction, § 4), the "State", nevertheless, remains a "State", though it disposes of no physical power at all and its legal power is subordinate to that of the occupying State.

But it is not necessary for our purposes to enter into any discussion of the many theories concerning sovereignty or occupation. After what has been said on the two meanings of the word "fact", it is obvious in the opinion of the author, that this word is used in the strict sense in the major but in the wider sense only in the minor, provided that we consider legal power to be an "Ought", a "duty". On the other hand, if "legal power" and "physical power" were really one and the same, as juridical positivism asserts when speaking of the *supreme* power of the State, the inference drawn above would result in a void tautology. Consequently, the notion: the right of the stronger is meaningless, it does not refer to any "right" at all, because no "duty", no "Ought" does correspond to this so-called "right". It is superfluous and erroneous to speak of the "right" of the wolf to kill a lamb, because nobody will speak of the "duty" of the lamb to let itself be killed by the wolf. We may say the like with respect to a gang of robbers and their victims, and, if we saw in the commands of a State only a Must and not an Ought, there would be no difference at all between the State and a huge band of robbers.

But if we try to find a line of demarcation between the State and a huge band of robbers, what is the difference between the commands of the State and the commands of the robbers? Both of them are *imperatives,* as far as their linguistic form is concerned. Both of them are categorical propositions ordering a person to act in a certain manner according to the will of *another* person, or, in the terminology created by Kant, they are *"heteronomous"* imperatives, in opposition to the "autonomous" imperatives of our conscience. Both of them are, according to juridical positivism, derived from the physical power to enforce them in the case of disobedience. Both of them are obeyed in most cases, and if some of these commands are not obeyed, they are mostly enforced, if necessary, even under penalty of death. Why do we call such commands "positive law", if they are given by a State, and "wrong" or "crimes", if they are given by a robber?

Obviously, the difference is to be found in a certain "authority" of the State, whilst the robbers have no such "authority" at all. But this notion of authority leads us to the question: from what source is this authority derived? If physical power is the source of the

authority of the State, why has a huge band of robbers not the same authority?

In the history of the theory of law, doubts were often cast upon the deduction of law from physical force. Sometimes, the opinion was expressed, that the true origin of the obligation of human laws is the consent of those whose obedience the law requires. Adolf Menzel[18] has shown that according to Xenophon[19] already Alcibiades and Pericles expressed the opinion that enforcing the will of the legislator instead of convincing those who are required to obey would mean "rather force than law". In recent times Kirchmann, Schloßmann, Bierling, Krabbe, and Radbruch have tried to derive the authority of positive law from the fact hypothetically supposed that everybody of the people has acknowledged law as a whole[20]. Roscoe Pound has pointed out that Justice Wilson and Jefferson adhered to similar ideas[21].

The merit of such doctrines and their significance for the history of jurisprudence are beyond doubt. But it cannot suffice to assert or to suppose that those who are required to obey in general, i. e. the people or the nation as a whole, have acknowledged the system of existing positive law as a whole.

Why should little children possessing a fortune, or the minority of the voters in a Democracy, or the oppressed majority in a tyrannical totalitarian State, be bound by and have rights and duties on the authority of positive laws which they have not approved? Obviously, the consent of a nation as a whole is a mere fiction, and a fiction made by an author has no power of commanding. Consequently, such theories cannot escape the presupposition of juridical positivism that the power of physical coercion only can be the ultimate source of the binding force of positive law with respect to children, the outvoted minority, or the oppressed majority.

The mere recognition of the principle that the Nation *as a whole* is the ultimate source of the *whole* system of law in every State would lead to the consequence that *every* State without any exception would be a Democracy. Even the most despotic rulers or ruling minorities in any non-democratic State, though enforcing obedience by means of the utmost terror only, could theoretically but in the imperative form of positive law declare themselves to be the representatives of the people and advance the legal fiction that even their most abominable laws are consented to by the people and hence constitute the will of the people.

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18 Kallikles, eine Studie zur Geschichte der Lehre vom Rechte des Stärkeren, 1922, pp. 51 ss.; Zeitschrift für öffentliches Recht, V, pp. 5, 6, 1925; Beiträge zur Geschichte der Staatslehre, 1929, pp. 76, 77; cf. the author's work: Recht und Sittlichkeit, 3d ed., 1935, pp. 32 ss.

19 Apomnemoneuata Sokratus, II, 2, 40 ss.

20 See the author's work: Der Wandel der Ideen, Staat und Volk, 1933, mentioned above, n. 14, pp. 354 ss. and 384 ss.

21 Roscoe Pound, Law and Morals, 1926, pp. 88, 89.

As is well known, a most famous example of such a fiction can be found in Roman Law. In his Pandects, Justinian, repeating a sentence of Ulpianus, states: "Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat"[22]. What pleases the princeps, has the force of Law, *because* ("utpote cum") the people has conferred all power on him by a Law of authorization called lex regia. The words: "utpote cum", "because" assert that the will of the people is the true *ultimate source* of any law given by the Emperor. A similar statement has been inserted in the Institutes[23]. The first Law of authorization of this kind was already promulgated in the reign of Vespasian. Therefore, according to their own declarations and according to the inevitable logical consequences of juridical positivism the Roman Emperors were Presidents of a Democratic Republic. It would be easy to draw analogous conclusions with respect to any absolute Monarchy or to Caesars of recent times as for instance to Mussolini or Hitler.

In his book: "La Démocratie"[24], the manuscript of which was sent to the Institut International de Droit Public in Paris at the beginning of 1933, a few weeks before the authoritative and totalitarian régime was established in Germany by a treacherous coup d'Etat, and which was published a few months ofter that coup d'Etat, the author availed himself of this opportunity in order to add to this work printed abroad a postscript pointing out that even the national socialist movement which had struggled against democracy with the utmost violence, nevertheless acknowledged — at least by solemn declarations — its fundamental principle, namely the idea that the people is the ultimate source of State power. New Germany was described as a "German Democracy", a "true Democracy", an "ennobled form of Democracy" etc. We may remember similar statements by Mussolini[25], whose example Hitler tried to emulate.

If such ideas were right, no political oppression, no despotism would be possible. The fictitious acknowledgment of the whole system of law by the whole people would be nothing but the fictitious social contract which in former times was generally believed in. In Rousseau's terminology, we would be entitled to say: "Tant que les sujets ne sont soumis qu'à de telles conventions, ils n'obéissent à personne, mais seulement à leur propre volonté"[26], and: "... on est libre et soumis aux lois, puisqu'elles ne sont que des registres de nos volontés"[27]. Even if an oppressed people or part of a people which is unarmed or not strong enough to face the

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22 l. 1 pr. D. I, 4.
23 § 3 J. I, 2.
24 s. above, n. 14, p. 11.
25 s. e. g. Mussolini's pamphlet: „La dottrina del fascismo", Milano-Roma, 1932, 1st part, chapter 9, and 2nd part, chapter 7.
26 Du contract social, livre IIe, IV.
27 ibidem, VI.

terrible weapons and means of destruction of the rulers or the ruling party in a State is suffering physically or morally in the most terrible manner, it would obey nothing but "its own will", and would be "free".

In opposition to the foregoing examples we must ask: was it ever heard of that judge-made law was looked upon, by the part of the population not consenting to it, as being despotic?

The answer can only be: no. It is true, precedents followed in later decisions have often been considered to be unjust by many people, as for instance in Pinnel's case. But unjust and despotic are different notions, and examples of injustice in a number of concrete decisions are different from the feeling of a people or a considerable part of a population that it is oppressed. It seems therefore that, on the whole, law created by judges is much more closely connected with the sense of justice of the a population than statute law or law created by administrative authorities. This is true to a certain degree with respect to customary law in every country, but at any rate it is true with respect to Anglo-Saxon Case Law, as follows from the considerations of the first part of the present work.

Nevertheless, precedents followed in later decisions are part of "positive" law, and they are followed only, *because* they are part of *positive* law. On the other hand, the positive law existing, followed, and enforced in a concrete State constitutes one and the same system of law. Nobody will assert for instance that British Statute Law and British Common Law are two separate systems of Law having no common general rules like British and Chinese Law. On the contrary, they have many common general rules and should be interpreted in the common sense of British Law as a whole. We may say the same of American Statute Law and American Common Law, and the same is true with respect to the particular law existing in the Dominions of the British Empire and in the Member-States of the United States. The authority of a State is indivisible, we cannot derive the authority of written law from another ultimate source than that of unwritten law; and as in any civilized State, no matter whether it is a democracy or not, and also in England at the time when its constitution was not democratic, both written and unwritten law exist together and constitute one and the same unit of law, it is impossible to consider the consent of those who are required to obey to be the ultimate source of Anglo-Saxon Case Law and physical force the ultimate source of any other kind of positive law.

Thus, so far the question what is the ultimate source of the authority or binding force of positive law, remains unsolved. We cannot explain the binding force of precedents in Anglo-Saxon Case Law by mere physical force, nor can we derive the binding force of any "positive" law in any State from the consent of those who are required to obey or of the majority of them.

In the opinion of the author, the two meanings of the word law and its derivatives mentioned above must always be clearly and logically distinguished from each other:

Law, resting on the approval of those who are required to obey as described in the first part of the work in hand, is *law as an Ought or autonomous law;* it is law and morals at the same time, because there exists one kind of Ought only in the world, namely the autonomous voice of our conscience and feeling of justice;

The commands of a band of robbers are a Must without being "law" at all, because they are mere facts in the strict sense not consented to by an Ought;

"Positive" law is a *Must,* a *fact* in the strict sense, *but differs from the commands of a band of robbers, if and as far as it is looked upon as being an Ought at the same time.*

Juridical and political practice, however, generally and systematically confuses the two meanings of the word law with each other. Even scientific terminology of philosophers and students of jurisprudence has no scruples of using the word law and its derivatives now in the sense of an Ought, now in the sense of a Must, now in a combined or a doubtful sense. And thus it can be explained that legal power is derived from physical power and at the same time physical power from legal power.

When reading positivistic theories concerning the sources of Law or solemn declarations of a supreme legislator which in reality are not consented to by the sense of justice of the population or the majority of it, we should always remember the famous trick of Baron von Münchhausen.

If the foregoing arguments are correct, they must be correct also with respect to judge-made law. A decision following a precedent constitutes a Must as far as it is obeyed or enforced in the case of disobedience. On the other hand, not only the precedent followed is looked upon as being an Ought, but also the second decision.

According to juridical positivism, the feeling of justice of those who are required to obey is legally irrelevant. Even the authors mentioned above, who derive the binding force of law as a whole from the consent of the nation as a whole, cannot divide the unit of positive law into two or several parts dependent upon the conscientious approval of the various parts of the population. Otherwise, in democracies the outvoted minorities would have positive laws of their own, and in non-democratic States there would sometimes exist no positive law at all.

If the sense of justice of those who are required to obey is legally irrelevant, as juridical positivism asserts, it follows according to the unavoidable laws of our logical thinking that the supreme legislator is legally omnipotent and infallible, because there is no authority in positive law higher than his. A given court decision, on the other hand, even if based on many precedents, is not

considered to be omnipotent or infallible, at least if we omit the above mentioned doctrine of the House of Lords. As every law student knows, any decision can be erroneous not only in point of fact but also in point of law, and it is often very difficult to decide whether a decision is right or wrong and whether a precedent should be followed or not.

In the opinion of the author, however, it is impossible to assert at the same time that the will of the legislator is omnipotent and infallible but that given decisions, particularly those which create a customary law, do not participate in the omnipotence and the infallibility of the legislator. The authority of Statute Law cannot be higher than that of Customary Law; on the other hand, according to the principle of *res judicata* any definitive decision is invested with the same binding force as if it were a *lex individualis* given by the supreme legislator, otherwise a rule of customary law *praeter* or *contra legem* could never arise from concrete decisions.

In order to furnish an example or authority for similar cases afterwards arising or for similar questions of law and thus to become a precedent, a decision must be justified in the sense of justice of the judges who have to decide subsequent cases. The judges again, if the Constitution of the State grants them independence, are in general the representatives of the sense of justice of those who are required to obey or at least of a considerable majority of them. If the judges try to find out the feeling of the population, we cannot speak of "law making under the guise of interpretation", as Roscoe Pound calls the sphere of action of the judge as far as it surpasses "genuine interpretation"[28] but they exercise *genuine* law making function. In this respect, Anglo-Saxon Case Law, as a prominent example of customary law, is most instructive for philosophy of law in general, and particularly for the theory of the sources of Law.

If the thesis of the author is right that no value can be derived from mere facts in the strict sense of the word and particularly from physical power, it is just this conscientious approval of those whose obedience is required which, according to the theory developed by the author, distinguishes the commands of State power from the commands of a huge band of robbers. Consequently, statute law must be justified by this consent as well as judge-made law. But as has been remarked in the first part, the consent of even the most humble and insignificant member of the community cannot be exacted by physical force. On the other hand, as we have seen in this part, it cannot be replaced by a mere fiction ordered by the legislator himself, otherwise persons actually in power by means of utmost violence and cruelty or of a mendacious coup d'Etat would be able both morally and legally to justify their regime by

[28] Roscoe Pound, An Introduction to the Philosophy of Law, 1925, p. 105.

conferring legal power upon themselves like the Roman Emperors, by conferring supreme legislative power upon themselves by a *lex regia,* thus acting like Baron von Münchhausen who endowed himself with a force excepting him from the law of gravitation.

Consequently, the legislator is neither omnipotent nor infallible. On the contrary, his legal power, as well as the lawmaking function of the judge in judge-made law, must depend upon the sense of justice of those who are required to obey.

Thus, positive law, if we demand that it be "law" and not a mere fact of obedience like the commands of a band of robbers, *must be supported, at least to a certain degree, by the consent of the population.*

But our problem is not yet solved. The main difficulty arises, *if opinions on what is just are divided,* if those who are required to obey a certain rule of law or a certain decision in judge-made law partly consent to it and partly disapprove of it.

We shall deal with this question in the third part.

III.

By pointing out that the binding force of law depends upon the feeling of justice of those who are required to obey we have not yet fully grasped the true character of law. It now appears as if law were composed of a sum of individual, subjective, and uncontrollable experience made by individuals, and as if no objectively valid norm and no objective duty to obey could be founded.

Thus, Law and State would be dissolved into a state of anarchy.

Therefore, the question must be raised whether and in what manner we are allowed to look upon Law as something that is generally valid and independent of the subjective approbation of the individual.

What is independent of the thoughts and feelings of the individual are first of all the thoughts and feelings of others. The judgment of value is a fact of reality for any other person no matter whether the second person approves of the content of that judgment of value or not. Such fact exists also in the common agreement of a plurality of individuals. If millions of our fellow-citizens agree on whether something ought or ought not to be, this constitutes a fact that is entirely independent of our own approbation and we must submit to this fact no matter whether we share the opinions of the others or not.

Thus we arrive first of all at a *relative* general validity or *relative* objectivity of judgments of value, and a relatively common autonomous law. In this sense, "objective" law would consist in those judgments of value with regard to which the plurality of individuals are of the same opinion. It is in this relative sense only

that we have spoken of the autonomy of law and of the consent of those who are required to obey in the first and second parts of the work in hand.

What we are in search of, however, is *absolute* validity, something that must be acknowledged by *everybody* no matter whether he agrees or not. For "positive" law existing in a given State must be vested with authority not only with respect to those citizens of the State who consent to it but also in the eyes of the outvoted or oppressed opposition, of any stranger, and of the whole International Community of Nations.

According to International Law, the representation of the States which are members of the International Community of Nations and the management of international relations is in the hand of the Heads or Chiefs of the States and of diplomatic agents. These persons must be *legally* authorized, which means, they must be authorized by the *positive* law existing in their respective countries. Thus for instance, before setting out on his mission, a public minister is in general furnished by his home Government with certain documents proving that he has been *legally* appointed to his office or charged with his mission, and the Government to which he is accredited is entitled to examine whether the Authorities who have appointed or charged this public minister are *legal* Authorities. Consequently, the positive law of any State is a part or a legal presupposition of positive International Law, and international intercourse necessarily involves the mutual acknowledgment of the systems of positive municipal laws existing in the various States.

Even Hitler's power, the power of the Chancellor and later the Head of a totalitarian State, though surreptitiously obtained by perjury committed against the democratic Constitution of Weimar and maintained by utmost violence and untruthfulness only, was a power of "positive" law and therefore, by legal necessity, a part or a legal presupposition of International Law, as well as the "positive" legal powers of other Governments. Therefore other Governments, who had nothing to fear from Hitler like his own subjects, and were able much more easily to see through his propaganda and his true intentions, acknowledged him, negotiated with him, concluded various Treaties with him, and considered his commands, with the exception of a number of crimes, and particularly his last order, namely the appointment of Admiral Dönitz as successor to the "leadership", to be legally valid, which means to be "positive" Law.

We see from these examples that the "positivity" of law involves *absolute* validity or an Ought for *everybody* in the world. Therefore, what has been said in the first and second parts of this work, cannot suffice in order to explain the binding force either of positive judicial precedents or of any other forms of positive law with respect to *everybody*.

If we are in search of absolute validity, we must distinguish the *fact* of a valuation from its *contents*. Facts in the strict sense of the word are of absolute validity as soon as certain suppositions of the theory of cognisance are admitted, without which any reflection would be of no purpose whatever. The *fact* that a judgment of value has been passed is always of absolute general validity, because it is a fact in the strict sense of the word. But as far as the contents are concerned, namely the valuation which is the object of this judgment, opinions may be divided. On the other hand, we are faced by a second fact of absolute validity, that is *obedience as such* if we leave aside the motives of it. Obedience paid to a command, even if it be the command of a robber, is a fact of general validity, a fact for everybody, no matter whether he consents to it or not. Therefore the States and the commands upon which they are based, namely the commands which are obeyed by the citizens of the State including the *rationes decidendi* of precedents, are facts of social life given to us with absolute validity, no matter why the citizens obey.

Thus, if we ask, what is law, if those who are required to obey partly consent to a rule and partly disapprove of it, we must try to find out to what degree the State as a given social fact depends upon mere facts in the strict sense of the word and to what degree it depends upon the contents of judgments of value.

According to juridical positivism, the State is based upon positive law and positive law is based upon the State. Up to now, the theory of law has not been able to avoid this *circulus vitiosus*, even when not physical power but either religious dogmata or rational natural law were looked upon as being the ultimate source of law. In the theory of the author, however, this new *circulus vitiosus* disappears as well as that mentioned in the second part of this work, as soon as we remember that "positive" law as such consists of facts in the strict sense of the word, namely of the mere fact of obedience, and consequently is not an Ought but a Must.

No matter what the persons in possession of power may choose to do, be it that they decide upon the passing and signing of statutes, that they promulgate them, or apply violence in order to enforce them, it still does not follow from all these facts that it is a person's "*duty*" to act in a certain manner. Speeches, signatures, printed papers, bayonets, and prisons have never created a "duty". Therefore, positive law as such does not contain the expression of what ought to be, but merely a conditional form of coercion. I am not told that I *ought* to obey, but that I *must* do so *if* I wish to avoid the disadvantages of disobedience.

Both the consequences resulting from doing right and doing wrong may be traced back to some form of physical power. This applies not only to penalties and other forms of coercion, but also to rewards and advantages granted by the Staate. Also the reward

is based upon some threatened coercion against that organ by which it is granted.

Thus, for example, it would be of no purpose to confer decorations and titles without issuing prescriptions prohibiting unauthorized persons to adorn themselves with such orders and titles. "Positive Law" is therefore in principle nothing but force and physical coercion to which the subjects actually submit. It is the very action of commanding and obeying based upon force and threatened coercion. *Those commands are termed "positive Law" which hitherto have actually been issued, obeyed, enforced, and applied, and, as far as the future is concerned, those of which on account of actual events which have already happened, it is to be expected that they will be actually employed, obeyed, and enforced also in future times.*

This refers to judge-made law as well as to statute law, but decisions following precedents are particularly good examples, because, if the judges are granted independence, the conflicts between the various political creeds existing in the State are eliminated in the interpretation of precedents to a much higher degree than in framing statutes.

Individuals do not exist in isolation. The *actual obedience* paid to the commands of State Power by the citizens as well as the judgments of value passed by them on what is a moral duty or what should be, *is a mass-phenomena.*

The autonomous conscience and sense of justice of any individual may add a judgment of value to the existing fact of the obedience of his fellow-citizens towards State Power in general or to any particular command issued by State Power. The opinions of various philosophers, the theories of various religious faiths, the programmes of political parties provide us with the most varied examples.

The valuation of obedience to a person as an official functionary of the State always contains *a valuation of mass obedience.* For this organ or agent is not obeyed as a private person, but because, according to the judgment of value of those who obey, this individual stands *for the State.* These judgments of value, again, refer to the fact that up to now this functionary, his superiors and the predecessors of all these functionaries have actually been issuing commands to which the others have actually obeyed. *Consequently, by acknowledging the existence of a right or an authority to command in an existing State, I also acknowledge mass obedience in the form it hitherto existed, and submit to it as a given fact that is independent of my personal conscientious approval.*

In quiet times, the great majority of the people living in a State are mostly convinced that those who are in possession of actual power in the State are also *entitled* and *permitted* to *rule,* whilst the remaining part shall and must obey. This refers to Legislators, Courts, and Administrative Authorities. *But approving the right or authority of a person to issue certain commands does*

not mean approving the contents of every command issued by such a person within the sphere of his competence or jurisdiction.

In particular, this is very often true with respect to substantive law as opposed to the rules according to which the substantive law itself is administered. He who criticises the contents of a statute or a judgment usually does not criticise the authority of the Legislator or the Court on principle, or the rules of procedure.

But among the rules of substantive law, too, there are many which are generally consented to by a great majority of the population of a State no matter whether this majority agrees with other rules or not: namely the laws and regulations concerning public security and, to a certain extent, public peace and public order. This does not mean the notion of "ordre public" as adopted for the first time in Art. 6 of the French Civil Code, a notion of Continental Private International Law, for which in the Anglo-American International Private Law (Conflict of Laws) the term *public policy* is used; but the rules which are necessary in order to protect the personal security of the individuals and the security of traffic, commerce etc. in every-day life.

On the other hand, in every State many laws which are undoubtedly "positive" law, are disapproved by considerable parts of the citizens, so that, in the eyes of these citizens, such norms constitute a Must only and are not considered to be an Ought at all. Thus, the conception of actual facts which we call the "positivity" of Law refers to a *twofold mass experience:* in the first place to the fact that the masses *actually* obey, no matter for what reasons, and in the second place to the fact that to a certain extent, on the part of the majority or a certain minority of the individuals, this obedience is based upon *autonomous judgments of value,* upon the sense of justice.

It follows from the preceding considerations: "Positive Law" distinguishes itself from actual events which are not "positive Law" by the autonomous approbation of the feeling of justice at least of a part of the people. The actual obedience of the masses living in a State becomes positive "Law" by the fact that, unlike the victims of a band of robbers, a certain part of the population obey not only because they are forced to do so, but also because they deem it to be their *duty* to do so, even if they consent only to rules concerning competence, or procedure, or public security, or other particularly important norms preserving society from anarchy, whilst they perhaps disapprove of many other rules of substantive law.

Two questions now arise: first what number of persons must *actually* obey and, in the second place, the obedience of what number must be based upon the *autonomous* feeling that it is a „duty" to obey.

Actual obedience must in any case be found with a very great part of the total population, and this majority must be sufficiently

stable. If in a country about ten per cent, nay, even only five per cent of the population were able in the long run constantly to resist State Power by means of superior weapons, we would speak of a revolution by which "positive Law" is changed; or, if the disobedience were tolerated by State Power without making use of physical force, we would eventually speak of a new customary law which has abolished the former "positive" Law in favour of the individuals or facts concerned.

In the first part of this work, we have expressed the intrinsic value of a given or presumed rule of law by a formula indicating the relation between the number of those who are required to obey the rule and those who consent to it. By means of an analogous formula, we could also, in order to measure the grades of positivity, indicate the relation between those who are required to obey and those who *actually* obey no matter for what reason. In analogy to the term: Consent quotient we might call this relation: Obedience quotient and use "q_o" as the algebraic symbol of this quotient. If "*m*" is the number of those who are required to obey and "*o*" the number of those who actually obey, the formula expressing the obedience quotient would read:

$$q_o = \frac{o}{m}.$$

In the case of an ideal law, the equation would read:

$$q_o = 1 = 100\ \%;$$

but this would be the case as well with respect to a band of robbers or an extremely tyrannical State, provided that the victims or the unfortunate subjects respectively were oppressed and enforced by so strong and so terrible means that practically hardly any one who would like to disobey could risk doing so, and that he who nevertheless would dare resisting State Power would know that he would sacrifice himself and perhaps others without any hope of success.

Consequently, the difference between the Must of positive Law and the Must in a band of robbers cannot be found in the fact of obedience. In other words, *physical power and coercion cannot be the source of positive "Law"*, although juridical positivism asserts that it is. On the contrary, the difference between positive "Law" and what the band of robbers or the extremely tyrannical State would call "law" is found only in the conscientious approval of a part of those who obey.

If we speak of a "Law" and a "State" in the case of a most despotic State whilst we do not use these terms with respect to a band of robbers, we do so only because, in the second case, we draw a clear line of demarcation between the robbers and the victims, and, when speaking of obedience, we think *of the victims only*, as if every robber were a sovereign ruler. In the tyrannical "State"

on the contrary, we call *both* the oppressors *and* the victims "subjects" or "citizens" and have *both of them* in view when calling such a community a "State". We suppose in such cases that among the oppressors themselves, particularly among the high officials, the pretorians, the hangmen and torturers, the secret agents of the tyrants etc., at least *a certain part* do not obey by fear of force only, or because they have no conscience at all, but because they believe it to be their "duty" to obey. Otherwise we could in general not speak of primitive or ancient or half-civilized despotic "States" and their "positive Law" but would be obliged to term them bands of robbers.

As soon as a band of robbers become so strong and so stable that we are compelled to investigate the obedience quotient and the consent quotient existing in the relations between the robbers or rulers *themselves with one another,* we would — not in International Law, but in sociology, in the theory of the origin and the sources of law, and in the language of every day — speak of types of "state", as it was the case with respect to the so-called "pirate states" of former times. In such cases, we would be faced by the problem of a "positive law" existing in such "states".

It follows from these considerations that when using the terms "State" and "positive Law" we in general presuppose two relations: first an *obedience* quotient approaching 100 % in the long run minus a certain average percentage of criminals existing in every country, and, in the second place, in opposition to the band of robbers, a *consent* quotient different from zero and referring at least to a small but important minority.

As long as no sufficiently stable majority actually obeying State Power has been obtained in a State, as for instance in the moment of the outbreak of a revolution or the accomplishment of a coup d'Etat, and as long as the various parties still struggle with one another, neither of the two systems of Law engaged upon such a struggle for power can be termed "positive" with certainty. This shows that there exist periods of transition and various grades of positivity. It is not the task of the present work to deal with such a struggle for power.

But the preceding arguments show us that, if we leave the figures of the obedience quotient aside, there must exist *another scale of the grades of positivity,* which indicates not the number but the *trustworthiness* of those who actually obey and consequently the *stability of the obedience quotient,* whatever the percentage of the latter may be.

The obedience rendered to the commands of positive Law by reason of coercion or fear of coercion is unreliable. He who looks upon a prescription of Law as being a Must only but not an Ought will in general have no scruples to withdraw from what is called a "duty" by State Power as soon and as far as he can. In every

State, even the most perfect democracy, such experience can be made with respect to statutes or rules of judge-made Law considered to be unjust by a considerable part of the people or of those who are immediately concerned by the rule. The more remote from democracy a State is in the scale of constitutions, the more oppression is necessary in order to keep the obedience quotient near 100 %, if the other conditions are equal. If in a non-democratic State a great majority, unarmed, not able to organise resistance against the formidable weapons and means of destruction in possenssion of State Power, is oppressed by laws which in their eyes are extremely unjust or even criminal, only the most horrible terror is able to maintain obedience, and even such a terror cannot prevent clandestine disobedience, passive resistance, and, in the long run, increasing attemps at open disobedience, active resistance, or assassinations. The lower the consent quotient is, the more unjust the laws are according to the feelings of justice of the population, and the longer the oppression continues, the more hideous are the means necessary to deter the people from disobedience. If the whole machinery of means of coercion and terrorism collapses, the régime will also break down, because it has lost its fundamentals, whilst, the higher the consent quotient is, the less will the régime depend upon prosecutions, prisons, tortures, and death penalties.

To summarize: the higher the consent quotient, the more stable is the obedience quotient and consequently positive Law; the lower the consent quotient, the more unstable is the social equilibrium constituted by the obedience quotient, and the easier can positive Law be subverted.

Thus we can easily understand, why despotic dictators, when they are at their wits' end, resort to war. It is much easier to be cruel, if a considerable part of the population is under military discipline, if any disobedience means treason or favouring the interest of the enemy, and if the army by defending nation and country unavoidably defends the régime at the same time.

So important is the consent quotient and so obviously is it the purpose of oppression and cruelty to replace the missing conscientious approval of those who are required to obey, that tyrants mostly as far as they can rely upon untruthfulness in order surrepitiously to obtain this approval and thus to improve the stability of the obedience quotient. Untruthfulness may save cruelties. Hypocrisy as a means of domination has already been described in Machiavelli's work *Il Prinicipe*. In our days, mendacious propaganda is of utmost importance. The purpose is: to gain the honest approval of honest people by deceiving them with respect to the actually existing facts and particularly the actual intentions of the rulers and thus to obtain a falsified but high consent quotient.

Thus we can in general easily conclude: the more cruelty and untruthfulness is used by a régime, the more differs the true

character and the true sense of justice of the oppressed and deceived majority of the population from the deceptive outward appearances.

In opposition to such States we see in States approaching or possessing a democratic Constitution that the consent quotient is obviously in general much higher and consequently the obedience quotient more stable. Nevertheless, circumstances are very different with respect to various countries, various branches of Law, and various political situations. It would require voluminous works to examine the relations between the consent quotient and the obedience quotient on one side and the mentioned circumstances on the other side. But one difference must be pointed out in this connection, namely the difference between statute Law and judge-made Law. Only after such apparently long digressions are we able now adequately to appreciate the value of judge-made Law in general and Anglo-Saxon Case Law in particular.

Undoubtedly statute Law is preferable to customary Law from various points of view which cannot be discussed here. Customary Law, however, in general has its origin much more in the sense of justice and much less in the actual struggle for power than statute Law, because the ideal world of the judges is more remote from political disputes and more interested in the voice of conscience and the sense of justice of the individual than that of the members of Parliaments.

Statute Law in non-democratic States is very often the expression of the will of a ruling minority only or even of a single ruling person, no matter whether this minority or this ruling person declares and tries to prove to the astonished world that in reality it represents 98 or 99 % of the population. But in democratic States statute Law is mostly the result of a combat namely the combat against an outvoted minority. A judicial sentence, on the other hand, as far as it depends upon the judge, which means as far as it goes beyond the mere execution of the will of a statute and provided that he feel sufficiently independent in deciding the given case, usually tries to convince also the person against whom the verdict has been delivered. This, at least, is or should be the true purpose of the dicta. The judge is not empowered to decide according to the principle: "Right or wrong, my country", whilst Legislators and Administrative Authorities often do so, but he has always to pronounce what is "right". Thus, we might say in short: *in principle, statute Law is a Law of domination or of the defeat of an outvoted minority, whilst customary Law is, as far as it depends upon the judges, a Law of conciliation.* We can conclude from this consideration: *it is most probale that, on the average, the consent quotient is higher in customary Law than in Statute Law.*

Anglo-Saxon Case Law, again, differs from Continental Customary Law in a decisive point. In Continental Law, the decision has binding force with respect to the case at bar only. In Anglo-Saxon

Common Law, on the contrary, it constitutes a *general* norm, namely not only a *lex individualis* for the case in litigation but a *lex generalis* for future cases; for either it follows a precedent, then it adds to the series of precedents a new precedent and thus confirms their authority, or it might become a new creative precedent. Consequently, the judge in Anglo-Saxon Case Law is vested with an important law making function in *any* case.

It is true, judge-made Law, when compared with statute Law, shows, as is well known, various remarkable disadvantages. But if we leave them out of the question, the result of the preceding considerations might be expressed in the following words: *Judge-made Law, based upon precedents, as it is to be found in Anglo-Saxon Case Law, constitutes that form of Law which, on the average, is founded upon a higher consent quotient than other forms of Law hitherto known, and in so far a more perfect form of positive Law.*

Now we are able to answer the question raised at the beginning of the second part: Anglo-Saxon Case Law is undoubtedly a part of the positive Law of the two Anglo-Saxon Powers, because the obedience quotient is near 100 % and it is based, on the whole, upon a high consent quotient; but it is a particularly perfect form of Law only, if and as far as the judge sees his task in finding out, within the limits drawn to him by existing statutes and existing precedents, what corresponds to the feeling of justice of those who are required to obey. Otherwise, the consent quotient, and consequently the stability of the obedience quotient would decrease, or, in other words, the probability that certain precedents would be followed in future cases, would decrease. Thus, it would lose its ideal advantage but keep its disadvantages.

By these remarks we return to the topic of the first part of this work. When deciding a case the judge has often, as Cardozo says, "the pain of choosing"[29]. Such a choice might be given for instance, as we have seen in the first part, between a certain precedent, customs, and considerations of social welfare, and, besides, a second choice could be given between several interpretations of the precedent, or various customs, or different opinions on what is social welfare. In such cases, it is the sublime task of the judge, not to ask, what is more useful from the points of view of the rulers or of the majority, as Parliaments would mostly do when framing a statute, but to ask: *What is Justice?* or, in other words: *What is true Law?* The author has tried to show the way in the first part.

Many opinions of courts and judges seem implicitily or more or less clearly to point at the aim which the author has attempted to indicate. Expressions like: "morals", "justice", "right and justice" etc. refer sometimes, it is true, to the feeling of right and wrong or

[29] The Growth of the Law, pp. 67, 68.

quite simply to the will of those who *command*, particularly of those who are in possession of legislative power or of the judges themselves, or of Administrative Authorities, but mostly to the feeling of the whole people, which means, more exactly speaking, of the majority of those who are required to obey. If, for example, an opinion is based upon what is "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare"[30], the conceptions: "morality" and "public welfare" seem to involve judgments on ultimate values not deducible from facts and causalities, whilst the notion: "strong and preponderant opinion" seems to be an approximate expression of what the author has attempted to conceive as a mathematical quantity, the consent-quotient.

The "general law" doctrine established in *Swift v. Tyson*[31] was based upon Cicero's *jus gentium*[32]. Another decision speaks of "considerations of right and justice which have been gathered into the great body of the rules and principles known as common law"[33]. On the other hand, the "thunderclap decision"[34] of *Erie Railroad Company v. Tompkins*[35] repudiates the "defects, political and social" of and the "injustice and confusion incident to" the doctrine of *Swift v. Tyson*. Nevertheless, in both cases we are faced by an appeal to the feeling of right and wrong of those who are required to *obey*. In the opinion of the author, Edward S. Stimson is right when declaring: "The problem of *Swift v. Tyson* is the problem of what is law. It is submitted that, apart from constitution or statute, law is a practically enforcible principle of truth, right or justice. Whether or not this is called "general law" as in *Swift v. Tyson* is of little importance"[36].

But whatever may be thought of the expressions used in concrete decisions, the spirit of any decision made by judges will always differ from the spirit of any general statute or international treaty made by legislators in one essential point. It lies in the power and in the free discretion of the legislator whether he decides a question or leaves the decision to the judge. The judge, however *must* decide any case brought before him and coming under his jurisdiction. Art. 4 of the French Civil Code is the expression of a general principle acknowledged in the civilized world by declaring: "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra etre poursuivi comme coupable de déni de justice". Whilst the supreme legislator, if he pleases,

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30 Noble State Bank v. Haskell, 219 U. S. 104, 111 (1911).
31 16 Pet. 1, (U. S. 1842).
32 16 Pet. 1, 19 (U. S. 1842).
33 Baltimore and Ohio Railroad Company v. Baugh 149 U. S. 368, 378 (1893).
34 McCormick and Hewins, 33 Illinois Law Review 126 (1938).
35 58 S. Ct. 817 (1938).
36 24 Cornell Law Review Quarterly, 79.

might perhaps act according to the principle: "Right or wrong, my country", the judge is *constrained* to search for the ultimate source of Law in order to have always a basis for his decision if any other source fails. And, in the opinion of the author, there exists such a source: *even if there were no statutes, no international treaties, no established rules of customary law, and no precedents at all, right and wrong would yet exist in the souls of men.*

But Right and Wrong existing in the conscience of men and in their feeling of justice, are not limited by State boundaries, and are the less influenced by them, the more these boundaries are artificial and arbitrary; on the other hand, as is well known, according to Anglo-Saxon Common Law[37] and the Constitution of the United States of America[38] International Law is a part of the Law of England as well as of the United States. Undoubtedly, what has been said in these lines with respect to the consent quotient and the obedience quotient as such, is not restricted to Anglo-Saxon Case Law but refers to *any* system of Law, consequently to International Law as well as to municipal law.

International Law consists of several ten thousand treaties and of a large number of customary rules. The treaties, with a few exceptions, constitute particular Law only. The rules of *general* International Law, with a few exceptions again, are *unwritten* Law. Especially the fundamental and most important rules are customary Law, as for instance those concerning the legal position and the functions of diplomatic agents and other organs of a State in its foreign relations, the modes of the acquisition and loss of territory, the conclusion, form, and ratification of treaties, the conditions for their validity, the rules for their interpretation, the freedom of the open sea, the right of innocent passage through the territorial sea, the diplomatic protection of citizens abroad, the fundamental rights of the individual or "rights of man" as long as the ideal of the totalitarian State had not yet eliminated them from the intercourse of States, the principle of *res judicata* in international arbitration and the procedure of international Courts, reprisals, retorsion, the customs of war on land on which the Hague regulations are based, and many others. Thus, undoubtedly, unwritten Law is of much more importance in International Law than in most systems of municipal Law.

Thus, we should think at first, that, from the point of view of the consent quotient, the obedience quotient and the stability of the rules of Law, International Law would certainly compare favourably with municipal law.

In the world of real facts, however, positive, International Law is involved in a deep tragedy. Already before the last war, in 1938,

[37] West Rand Central Gold Mining Co. v. The King, L. R. 1905, 2 K. B. 391; Nereide, 2 Cranch 383, 423; Paquete Habana v. United States, 175 U. S. Rep. 677.
[38] Art. VI, § 7, and Art. I, section 8, n. 10.

Philip Marshall Brown described this tragedy in the following words: "That international law is seriously discredited and on the defensive is all too evident. That it is rapidly being jettisoned without any indication of a desire to create a substitute system of law between nations is increasingly apparent. The blatant demands of national egoism are producing inevitably another epoch of lawlessness which, because of the disillusionments of a more enlightened age, may prove worse than the dark Ages"[39]. It would be easy to add other sayings of famous writers.

Thus, we must ask: what is the reason of the failure of customary law in the intercourse of States?

In the opinion of the author, the answer is: International customary Law, for the most part, is not judge-made law but consists of actions of Governments and their executive organs. A comparatively small part of unwritten International Law only is created by decisions of Courts of Arbitration or the Permanent Court of International Justice. Moreover, the settlement of international disputes by judges is ruled by the principle: *res judicata jus facit inter partes*, but not by the principle of *Stare Decisis*, and consequently the judges are not vested with any lawmaking function for future cases. Actions of Governments and Government officials on the other hand, including those actions which constitute customary Law, are mostly ruled by the ideal of the sovereignty of the State. The notion of sovereignty again, if carried out in a logical manner, inevitably involves a certain tendency towards the principle: "Right or wrong, my country" and, at least in foreign relations, towards totalitarianism, even in States, which grant the "rights of man" to their own citizens.

But what the author has tried to show in these pages with respect to the conscience and the sense of justice of those who are required to obey, refers to International Law as well as to any municipal law. It is not the purpose of this work to deal with the sources of International Law in general. But it may suffice for our task to remind the reader of the fact, that one of the most important general international agreements furnishes in express terms and in a formal manner a proof that the conscience of the peoples is of fundamental importance for the interpretation of International Law.

In its Introduction, the Convention regulating the Laws and Customs of Land Warfare solemnly declares that it is important "de réviser les lois et coutumes générales de la guerre, soit dans le but de les définir avec plus de précision, soit afin d'y tracer certaines limites destinées à en restreindre autant que possible les rigueurs", and that "les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent

[39] 32 Am. Jour. Int. Law 776 (1938).

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positivism is constrained to assert, it must be a *source of Law*,
according to what has been said in the second part of this wo
the *true and ultimate source of any Law.*

In the opinion of the author, Philip Marshall Brown is perfectly right in declaring, with respect to the mentioned tragedy of International Law, that "The time has come for jurisconsults frankly to acknowledge this desperate state of affairs and to undertake the renovation of international law or the creation of an entirely new system of law adequate to the demands of a new social order", and "That the stumbling block of sovereignty must be removed from the international highway"[41]. The author also fully sympathizes with Quincy Wright's ideal conception "that peace is not merely the absence of war but the absence of injustice"[42]. But if we ask what are justice and injustice, the only answer which objective science independent from the political struggle for power, can give, is: justice is the voice of the conscience and of the sense of justice of those who are required to obey.

Thus, the only way to attain the ends of an international order generally acknowledged as being just, and consequently to a really durable peace, is to replace as far as possible the rules of International Law made by Governments by rules made by Judges invested with lawmaking functions.

Stare Decisis, in this connection, would not mean: *Quieta non movere*, nor: following any precedent whatever, but: *administering justice according to "la conscience publique", public conscience, the World's Conscience.*

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40 Reference may be made to the author's work Die Haager Landkriegsordnung, Im Selbstverlag der Universität Hamburg, 1946, 3d. ed. Wolfenbütteler Verlag, Wolfenbüttel, 1947, pp. 20 et seq., 31 et seq., and 53 and seq.

41 32 Am. Jour. Int. Law 777. (1938).

42 33 Am. Jour. Int. Law 14 (1939).

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